the act which was not raised in the case, and upon which we express no opinion, to which attention ought, however, to be called.

As we have seen, section 19 denies to voters residing in the town the right to vote in such election. Nevertheless section 24 provides that "a tax shall be levied on all property liable to state tax in such magisterial district" to pay the interest on the bonds, and to create a sinking fund to retire the principal at maturity. Quære: Are these features of the act repugnant to section 6 of our Bill of Rights, which declares: "That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed, or deprived of, or damaged in their property for public uses, without their own consent, or that of their representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good"?

Reversed.

Note.

It was pointed out in an editorial last month (14 Va. Law Reg. 894) that grave doubts exist as to the constitutionality of this statute on the ground that it conflicts with the Bill of Rights. In this editorial will be found references to other places in the "Law Register" where this question has been discussed. The concensus of opinion seems to be that this is taxation without representation, and hence the statute is void as contravening the Bill of Rights.

LOUISA COUNTY *v.* YANCEY'S TRUSTEE *et al.*

Jan. 21, 1909.

[63 S. E. 452.]

1. Appeal and Error (§ 356*)—Requisites for Transfer of Cause—Writ of Error—Effect.—Where a writ of error granted by the Supreme Court of Appeals to the circuit court is perfected within the time prescribed by law, it is no ground for dismissing the writ that a writ of error from the circuit to the county court was not perfected in time; but the court has jurisdiction to review the action of the circuit court, and, if that court did not have jurisdiction, to reverse its judgment and order a proper judgment, but, if it appears that the circuit court had jurisdiction, the Supreme Court of Appeals will pass on the errors assigned in the petition for a writ of error to that court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1926; Dec. Dig. § 356.*]

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*For other cases, see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

2. Appeal and Error (§ 178*)—Review—Questions Not Raised in Lower Court—Time of Perfecting Writ of Error.—Where, on writ of error from the circuit to the county court, no question was raised as to the jurisdiction of the circuit court because the writ had not been perfected within the time prescribed by Code 1887, § 3474 (Code 1904, p. 1858), and, through no fault of petitioner, there is nothing in the record to show whether it had been perfected in time, it is too late to raise the question for the first time on error to the Supreme Court of Appeals, since, if the question had been raised in the lower court, petitioner might have been able to show, by matters without the record, that the writ was perfected in time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1133; Dec. Dig. § 178.*]

3. Appeal and Error (§ 882*)—Right of Review—Estoppel—Recognition of Liability.—Where a county in the lower court conceded by its requested instruction that it was liable for plaintiff's goods, used in supporting persons in quarantine other than plaintiff and his family, and a charge to that effect was given, though the requested charge itself was refused, the county could not raise the question on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3602; Dec. Dig. § 882.*]

4. Appeal and Error (§ 842*)—Review—Sufficiency of Evidence.—The county having asked that a verdict for the value of goods used by persons in quarantine be set aside as contrary to the evidence, though the county concedes its liability for goods actually used, the question arises on writ of error whether the evidence shows what goods were used to support the persons in quarantine.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 842.*]

5. Counties (§ 142*)—Action for Goods Used by Persons in Quarantine—Evidence.—Evidence held not to show the value of goods of plaintiff used to support persons other than plaintiff and his family while quarantined in plaintiff's building.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 142.*]

6. Health (§ 13*)—Local Board of Health—Abatement of Nuisances—Statutory Provisions.—Under the express provisions of Code 1887, § 1713d, subd. 5 (Code 1904, p. 887), a county board of health is authorized to see to the abatement of nuisances.

[Ed. Note.—For other cases, see Health, Cent. Dig. § 9; Dec. Dig. § 13.*]

7. Counties (§ 142*)—Liability—Goods Destroyed by Local Board of Health.—A county is not liable for the value of property destroyed as a nuisance by a local board of health, in the absence of statute

*For other cases, see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

imposing the liability, and hence is not liable for goods infected with smallpox so destroyed.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 142.*]

8. Eminent Domain (§ 43*)—Abatement of Nuisance—Nature of Remedy—"Appropriation to Public Use."—Destroying property as a dangerous nuisance is not an "appropriation to public use," but is to prevent any use of it by the owner and end its existence, because it could not be used consistently with the maxim, "Sic utere tuo ut alienum non lædas."

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 43.*]

9. Eminent Domain (§ 43*)—Abatement of Nuisances—Nature of Remedy—Exercise of Police Power.—In abating nuisances, the public does not exercise the power of eminent domain, but the police power.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 43.*]

Error from Circuit Court, Louisa County.

Action by one Yancey's Trustee and others against the County of Louisa. There was a judgment of the circuit court, modifying and affirming a judgment of the county court for plaintiff's, on appeal by both parties from an allowance of part of plaintiffs' claim by the board of supervisors, and defendant brings error. Reversed, and remanded for a new trial.

R. L. Gordon, Jr., for plaintiff in error.
Bibb & Bibb, for defendants in error.

BUCHANAN, J. Before the argument of this case upon the merits the defendants in error moved the court to dismiss it, upon the ground that the writ of error granted to the judgment of the county court by the circuit court was not perfected within the time provided by statute.

If this were true, it furnishes no ground for dismissing this writ. The writ of error granted by this court was perfected within the time prescribed by law, and it, therefore, has jurisdiction to review the action of the circuit court, and to determine whether or not it had jurisdiction, and, if it had not, to reverse its judgment and enter such judgment as the circuit court ought to have entered. If, on the other hand, it appears that the circuit court had jurisdiction, it will be the duty of this court to pass upon the errors assigned in the petition for the writ of error to this court.

The ground upon which it is claimed that the circuit court was without jurisdiction is that the judgment of the county

*For other cases, see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

court was rendered on the 18th day of August, 1903, and the writ of error to that judgment was not awarded until the 14th day of September, 1904, or at least that no bond was executed until after that date.

It appears that an application was made to Judge Mason on or before January 7, 1904, of whose circuit the county of Louisa was then a part, and he was of opinion that the petitioner had an appeal as a matter of right, and that it should be docketed in the circuit court for that county, where it would be heard de novo. Subsequently a writ of error without date was awarded by Judge Grimsley, to whose circuit the county of Louisa had been transferred, but the writ was not to take effect until the bond required should be executed. On the 14th day of September, 1904, an order was entered by the circuit court striking the case from the docket as improperly thereon, but awarding a writ of error, not to take effect, however, until the bond required by the order was executed. On the 14th of November following, an order was entered by consent of parties, making the case a vacation cause, stating that: "The writ of error granted in this case failing to show when the petition for the writ was presented to the judge of this court, the court doth further order that the clerk of the court enter upon said petition that it was presented to him on the 10th day of May, 1904, the court being satisfied that the said petition for a writ of error was presented on that day, and the writ of error granted the following day."

When the case was argued in the circuit court made a vacation case by consent, and submitted to the court for decision, no question was raised as to the jurisdiction of the circuit court because the writ of error had not been perfected within the time prescribed by law. If it had been, the plaintiff might have been able to show that the bond had been executed within a year after the judgment of the county court had been rendered, after deducting the time which elapsed between the presentation of the petition for the writ of error and the delivery of the record with the petition to the clerk of the appellate court. Code 1887, §§ 3470, 3474 (Code 1904, pp. 1855-1858). How long this was does not appear from the record, and for its nonappearance the petitioner was not responsible.

The question of whether or not the writ of error was perfected within the time prescribed by law, being one which might have been affected by matters not appearing in the record, ought to have been raised in the circuit court. Not having been done, it is too late, under the facts and circumstances of the case, to raise it here for the first time.

It appears that the claimant and his brother, in the year 1902, were doing a general merchandise business at Green Spring, in the county of Louisa, under the name and style of Yancey Bros. The business was conducted in a room of the same building in which the claimant and his family resided. Smallpox having broken out in his home, the house was quarantined. In addition to his own family and employees, other persons were quarantined or kept in the building, and all were supported and maintained, during the time they were there, out of the said store, by direction of the physician in charge. Some of the goods were destroyed by direction of the board of health. The goods not so used and destroyed were greatly depreciated in value because of the existence of the smallpox in the building and the use made of the building during that time.

The claimant, as surviving partner, presented a claim against the county, amounting to $2,777.78, made up of the following items:

Statement of Account Filed by Yancey Bros.

Goods from store used for hospital purposes by order of Dr. May, as per itemized statement herewith filed.....	$406 86
Goods destroyed by broad of health, as per itemized statement herewith filed.....	196 35
Rent of house as hospital, 3¼ months.....	81 25
Loss of use of storehouse for the remainder of lease, by reason of being made a hospital, 12¾ months.....	183 75
3 months' compensation as postmaster, express and depot agent, by reason of establishing as a detention house of the hospital three months, at $25 per month.....	75 00
Loss of stock while under control of the county.....	522 07
Depreciation of stock by the reason of the use of building for hospital purposes.....	500 00
Damage in loss of actual profits from enforced suspension of mercantile business by order of board of health, in conjunction with board of supervisors during the establishment of hospital in the building and the continuance of the quarantine and the assumption of absolute control of said property by said board.....	812 50
	$2,777 78

Of this sum the board of supervisors of the county allowed $92.75 for goods actually destroyed, and articles purchased by the county authorities, and rejected the residue of the claim. From that action of the board of supervisors both parties appealed to the county court.

Upon the trial in that court, the jury were instructed that there could be no recovery against the county for any part of the claimant's account, except as to the item for goods furnished from the store for hospital purposes and articles destroyed by

order of the board of health; and, as to these items, the court instructed the jury as follows:

"(1) As to the item of $406.86, for goods from store used for hospital purposes, by order of Dr. May, as per itemized statement herewith filed, the plaintiff is entitled to recover only the amount of the value of such items of such goods as were used by Dr. May, and were supplied by his order to, and used by, or for, parties other than by the plaintiff Lewis Yancey, his brother, sisters, and employees, such value to be determined by the jury upon the evidence as of the time such goods were so supplied and used; and the burden of proof is upon the plaintiff to show what amount of such goods were so supplied and used, and said value thereof, the defendant, the said county of Louisa, not being liable to said plaintiff for such goods as were used by or for him, his brothers, sisters, and employees.

"(2) As to the item of $196.25, for goods destroyed by board of health, as per itemized statement herewith filed, the plaintiff is entitled to recover the amount of the value of such items of such goods as were destroyed by such board, or by order of Dr. May, which are not covered by the items of the account allowed by the board of supervisors of Louisa County, such value to be determined by the jury upon the evidence as of the time such goods were so destroyed; and the burden of proof is upon the pliantiff to show such value."

Under these instructions the jury found a verdict for $466.49, of which sum $270.64 was for goods used for hospital purposes, and $195.85 for goods destroyed by the board of health. The county court entered judgment for the amount of the verdict, and to that judgment the circuit court granted a writ of error upon the petition of the county.

That court, being of opinion that there was no error in the judgment of the county court, except as to the sum of $115, the value of a box of shoes destroyed by order of the board of health, reduced the judgment to that extent, and as amended affirmed it.

To that judgment this writ of error was awarded.

The errors assigned here are, in substance, that the county is not liable, either for the goods destroyed or for the goods furnished for hospital or quarantine purposes, or, if liable at all for goods furnished, it is liable only so far as they were used to support and maintain persons in quarantine other than the claimant's family and his employees, and that there is no proof showing what goods were so used.

The question of whether or not the county is liable for goods used in supporting and caring for persons in quarantine cannot be raised here. The county court held that the county was not

liable for them, so far as used for the maintenance of the claimant's family and employees. As to the other persons in quarantine the county conceded, by its instruction No. 4, that it was liable for goods furnished, so far as it was proved that they were used for the purpose of maintaining persons in quarantine other than the claimant's family and employees. While the instructions offered by the county were not given, the county court did instruct upon that point, as the county had asked. The county cannot now be heard to complain of the instruction of the court upon that question.

But as it asked the court to set aside the verdict of the jury as contrary to the evidence, the question does arise whether or not the evidence shows what goods were used for that purpose.

It is impossible to ascertain from the evidence how the jury fixed the liability of the county for goods furnished at $270.64. No account of the goods furnished for, or used by, the persons in quarantine was kept. It is not shown what any of them used. If, in the absence of any such evidence, the jury would have been justified in concluding that each person in quarantine used and received the benefit of an equal share of the goods furnished from the store, not over 9-15 of the goods so used could have been chargeable to the county; and yet the sum ascertained is in excess of that sum.

The next question is whether or not the county is liable for the goods destroyed by the local board of health.

By section 1713d, Code 1887 (Code 1904, p. 885), the local board of health was authorized, among other things, to see to the abatement of nuisances. But there is no provision in that section, or elsewhere in our statute law, which makes the county liable for the value of property destroyed as a nuisance by the local board of health; and, without such a statute, it seems to be well settled that there can be no recovery against a city, and still less against a county.

Mr. Dillon, at section 956 of his work on Municipal Corporations, says: "Municipal corporations, or certain officers thereof, are sometimes appointed by charter or statute agents to judge of the emergency, and direct the performance of acts which any individual might do at his peril, without any statute at all. And by statute or charter such corporations are not unfrequently made liable for damages which individuals may sustain for buildings or property which are destroyed, under the direction of the proper officers, to prevent the extension of a fire. The liability of the municipal corporation in such cases is purely statutory, and therefore, in order to charge the corporation, the case must be clearly and fairly within the enactment."

The rule, as laid down by Mr. Dillon, is fully sustained by the decisions, and applies to many other cases besides fire; some of them, as was said in Bowditch *v.* Boston, 101 U. S. 16, 25 L. Ed. 980, "involving the destruction of life itself, where the same rule is applied. * * .* In those cases the common law adopts the principle of the natural law, and finds the right and the justification in the same imperative necessity." See Field *v.* Des Moines, 39 Iowa, 575, 18 Am. Rep. 46, where many cases on the subject are collected, and Dunbar *v.* Augusta, 90 Ga. 390, 17 S. E. 907.

It is also well settled that destroying property because it is a dangerous nuisance is not, as seems to be contended in this case, an appropriation of it to a public use, "but is to prevent any use of it by the owner and end its existence, because it could not be used consistently with the maxim, 'Sic utere tuo ut alienum non lædas, " and that in abating nuisances the public does not exercise the power of eminent domain, but the police power. Dunbar *v.* Augusta, *supra;* Field *v.* City of Des Moines, *supra,* and cases cited.

We are of opinion, therefore, that the county was not liable for any part of the goods destroyed by the local board of health, and that the county court erred in not so instructing the jury.

We are further of opinion that it erred in not setting aside the verdict of the jury upon that ground, and also upon the ground that the verdict is not sustained by the evidence as to the value of the goods furnished to the persons in quarantine other than the family and employees of the claimant.

The judgments of the circuit court and of the county court must each be reversed, the verdict of the jury in the county court set aside, and the cause remanded to the circuit court for a new trial, to be had not in conflict with the views expressed in this opinion.

Reversed.

Note.

Although there appear but few adjudicated cases on the point of the power of a county to destroy property in the interest of the public health, there seems to be little doubt as to the correctness of the decision in the above case, although the question might well be asked whether the county is not given an unnecessary amount of power, should it attempt to use it in an oppressive manner.

Since most of the cases arising have had to deal with the destruction of property within municipal corporations where the power emanates from particular charters, it does not seem necessary to enter into other than a cursory review of their holdings.

The decisions seem to be unanimous as to the power of the municipality to destroy property to prevent the extension of a fire, to sustain which proposition the court might have cited the Virginia case of Beach *v.* Trudgain, 2 Gratt. 220, holding that the destruction of property to prevent the spread of a conflagration in a city is lawful,

when the act is done in good faith and under apparent necessity, though the rule would be otherwise where the building might have been prevented from taking fire by the use of the means within the power of parties pulling it down. This case cited in Amick *v.* Tharp, 13 Gratt. 564, 570; The Brinton, 66 Fed. Rep. 71, 73.

Necessity for the destruction of the property or at least a reasonable foundation, under all the circumstances at the time, for viewing such an act as necessary, must appear. "Certainly the progress of a fire would not justify the destruction of a house, in some isolated place, that could constitute no agency in communicating the threatened danger. This would leave the way open for the commission of arbitrary and tyrannical acts with impunity. The rule stated in the cases above cited underlies the one before us. A city can no more destroy the property of the citizen in stamping out an epidemic than in checking a fire, but to the same extent it can do this, with exemption from liability, in a proper case. In the exercise of the power to abate nuisances, a city may summarily destroy individual property, if necessary to correct the evil. Meeker *v.* Van Rensselaer, 15 Wend. 397. But, to warrant resort to such harsh and extreme proceeding, the necessity should exist, or at least what would be deemed a necessity as viewed from the standpoint of a reasonable person. The burden in such cases is upon the city to allege and prove facts that would bring the case within the exception to the said constitutional provision. Mayor, etc. *v.* Mulligan (Ga.), 22 S. E. 621." City of Dallas *v.* Allen (Texas), 40 S. W. 324. See also, The Brinton, 66 Fed. Rep. 71, 73. It would seem, therefore, that if the articles in question could have been rendered innocuous by a simple process of disinfection, there was no necessity for their destruction, but the authorities considering such a course inadvisable, the Board of Health being a tribunal created by statute, clothed with large discretionary powers, much weight should be given their opinion in the matter. See City of Dallas *v.* Allen (Texas), 40 S. W. 324; Meeker *v.* Van Rensselaer, 15 Wend. (N. Y.) 397. As said in Hennessy *v.* City of St. Paul, 37 Fed. Rep. 565, citing Everett *v.* City, 46 Iowa 66; Yates *v.* Milwaukee, 10 Wall. 497; Underwood *v.* Green, 42 N. Y. 140: "Power to abate or suppress is confined to abating or suppressing that which is imminently dangerous, to life and property and where the facts do not create the danger, a resolution or ordinance of the common council to the contrary cannot avail."

In Cooley's Constitutional Limitations (5th Ed.), at page 722, in a note, the learned author, speaking of boards of health, says: "Though they cannot be vested with authority to decide finally upon one's right to property, where they proceed to interfere with it as constituting a danger to health, yet they are vested with quasi judicial power to decide upon what constitutes a nuisance, and all presumptions favor their actions." And again, at page 742, in a note, citing authorities, he says: "Whether any particular thing or act is or is not permitted by the law of the state must always be a judicial question, and therefore the question what is and what is not a public nuisance must be judicial, and it is not competent to delegate it to local legislative or administrative boards. The local declaration that a nuisance exists is, therefore, not conclusive, and the party concerned may contest the fact in the courts." Dillon, in his work on Municipal Corporations (4th Ed.), § 374, says the authority to prevent and abate nuisances and its summary exercise "may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal nature of a nuisance; but such power conferred in general terms cannot be

taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which in its nature, situation, or use is not such." In Wood's Law of Nuisances (§ 740), it is said, where the public authorities abate a nuisance under authority of a city ordinance, "they are subject to the same perils and liabilities as an individual if the thing abated is not in fact a nuisance. It would, indeed, be a dangerous power to repose in municipal corporations to permit them to declare by ordinance or otherwise anything a nuisance which the caprice or interests of those having control of its government might see fit to outlaw, without being responsible for all the consequences; and, even if such power is expressly given by the legislature, it is utterly inoperative and void, unless the thing is in fact a nuisance, or was created or erected after the passage of the ordinance, and in defiance of it." In Yates *v.* Milwaukee, 10 Wall. 497. Mr. Justice Miller said: "It is a doctrine not to be tolerated in this country that a municipal corporation without any general laws, either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city at the uncontrolled will of the temporary local authorities." In Hutton *v.* City of Camden, 39 N. J. Law 122, it was held that the action of the board of health could not determine conclusively that a nuisance exists, and that such a conclusive determination could be made only in a regular course of law before an established court of law or equity. In Underwood *v.* Green, 42 N. Y. 140, the action was to recover the value of dead hogs removed under the direction of the city sanitary inspector, an officer clothed with judicial discretion, and acting under a city ordinance declaring that all dead animals "be forthwith removed and disposed of by removal beyond the limits of the city or otherwise, so as most effectually to secure the public health;" and it was held that it must be shown, in order to justify the act, that the dead hogs were or would become in some way dangerous or deleterious to public health. The following are also instructive authorities upon the same subject: Mayor, etc., of New York *v.* Board of Health, 31 How. Pr. 385; Clark *v.* Mayor, etc., 13 Barb. 32; Rogers *v.* Barker, 31 Barb. 447; Coe *v.* Schultz, 47 Barb. 64; Lawton *v.* Steele, 119 N. Y. 226, 23 N. E. Rep. 878. The result of these authorities is that whoever abates an alleged nuisance, and thus destroys or injures private property, or interferes with private rights, whether he be a public officer or private person, unless he acts under the judgment or order of a court having jurisdiction, does it at his peril; and when his act is challenged in the regular judicial tribunals it must appear that the thing abated was in fact a nuisance. This rule has the sanction of public policy, and is founded upon fundamental constitutional principles. People *v.* Board of Health, 140 N. Y. 1, 35 N. E. 320, 322. See, also, Mayor, etc., of Savannah *v.* Mulligan, 95 Ga. 323, 22 S. E. 621.

Since these principles are applicable to mere municipal corporations, there would seem to be still less reason for questioning the liability of a county in this regard, for, as held in Fry *v.* County of Albemarle, 86 Va. 195, 9 S. E. 1004, the sovereign cannot be sued except by its own consent, as may be provided by law; and that in the exercise of its sovereign power it is liable neither for misuser nor non-user; and that a county in this state is a political subdivision of the state for governmental purposes as prescribed by public law, and is no more than the state liable to be sued for its public acts, and that it cannot be held chargeable for the acts of an officer whose duties are fixed

and prescribed by law. Suits against the state are allowed by law under certain regulations, and, in certain specified and enumerated cases, counties in this state are authorized to sue and are suable in the circuit court held for such county in their own names, but these are limited. And especially is this true since the Virginia Code, 1904, § 1713d (5), after providing that county boards of health shall have charge of the sanitary affairs of the counties for which they are appointed and have control of the prevention and eradication of contagious and infectious diseases, expressly states that "They shall likewise have power to adopt and enforce such reasonable rules and regulations as they may deem necessary to attain these ends."

PARKS *v.* COMMONWEALTH.

Jan. 21, 1909.

[63 S. E. 462.]

1. Criminal Law (§ 542*)—Evidence at Former Trial—Grounds of Admission—Death of Witness.—Where a witness who had testified for accused at his first trial, when she was cross-examined by the state's attorney, died before the second trial, her testimony at the first trial was admissible for accused on his second trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1232; Dec. Dig. § 542.*]

2. Homicide (§ 300*)—Instructions—Applicability to Evidence.—In a homicide prosecution, evidence held not to show that accused provoked the difficulty, so as to justify an instruction as to its effect on the right of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 628; Dec. Dig. § 300.*]

Error to Circuit Court, Scott County.

Ira Parks was convicted of voluntary manslaughter, and he brings error. Reversed and remanded for further proceedings.

W. S. Cox, for plaintiff in error.
Willaim A. Anderson, Atty. Gen., for the Commonwealth.

WHITTLE, J. The accused, Ira Parks, brings error to a judgement of the circuit court of Scott county, whereby he was convicted of voluntary manslaughter, and sentenced accordingly.

The first assignment of error is to the action of the court in excluding the testimony given by the wife of the plaintiff in error on a former trial of the case.

The witness testified at the first trial, and was cross-examined

*For other cases, see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.